SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 511

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

THE CITIZENS NATIONAL BANK IN ABILENE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The opinion of the Court of Civil Appeals for the Eleventh District of Texas is reported on pages 765 to 769, inclusive, of Volume 126 of the Southwestern Reporter, 2d Series.

The majority and dissenting opinions in the Supreme Court of the State of Texas are reported on pages 1003-1008 and 1008-1011, respectively, of Volume 150 of the Southwestern Reporter, 2d Series, advance sheets.

Grounds of Jurisdiction.

In the interest of brevity, we adopt the "Jurisdictional Statement" appearing in the foregoing petition for writ of certiorari.

The majority and dissenting opinions, also the judgment, in the Supreme Court of Texas were filed on March 19, 1941 (R. 127, 134, 142). Timely motions for rehearing were filed under *Article 1762,* Vernon's Revised Civil Statutes of Texas, 1925 (R. 143, 152). "After due consideration", these motions were overruled on May 14, 1941 (R. 163).

Jurisdiction of this Court is invoked under paragraph (b) of Section 344 of Title 28 of the United States Code (Judicial Code, section 237, as amended).

The Supreme Court of Texas, by a majority opinion, has arbitrarily refused to enforce the plain and unambiguous contract made by the parties, sanctioned by statute and violative of no law or public policy, thereby depriving the Railway Company of its liberty and property, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Texas, by a majority opinion, has arbitrarily changed the terms of a contract between the parties and has written new provisions for them requiring performance by the Railway Company and excusing performance by Locke or the Bank, thereby depriving the Railway Company of the equal protection of the law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Texas, by a majority opinion, has arbitrarily refused to give effect to *Article 5468,* Vernon's Revised Civil Statutes of Texas, which authorized or permitted the making of the contract before the court, thereby depriving the Railway Company of its liberty and property, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Texas, by a majority opinion, has arbitrarily invoked the lien statutes of Texas in aid of its refusal to enforce the contract between the parties and has so construed or given effect to such statutes as to cause

them to impair the obligation of the contract, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

The aforementioned actions of the majority of the Supreme Court of Texas, and each of them, are in "clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'," *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

In accordance with *Article 1762*, Vernon's Revised Civil Statutes of Texas, 1925, requiring grounds to be specified, the foregoing errors were set forth in motions for rehearing (R. 143-152, 152-153), when they became apparent from the majority opinion of the Supreme Court of Texas. "After due consideration" by that court, the motions were overruled (R. 163).

Statement of the Case.

In the interest of brevity, we adopt as our statement of the case the "Summary and Short Statement of the Matter Involved" appearing in the foregoing petition for writ of certiorari.

Specification of Errors.

1. The Supreme Court of Texas erred in refusing to enforce the plain and unambiguous contract made by the parties, sanctioned by statute and violative of no law or public policy, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

2. The Supreme Court of Texas erred in changing the terms of the contract between the parties and in writing new provisions for them requiring performance by the Rail-

way Company and excusing performance by Locke or the Bank, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

3. The Supreme Court of Texas erred in refusing to give effect to *Article 5468*, Vernon's Revised Civil Statutes of Texas, which authorized or permitted the making of the contract between the parties, thereby depriving the Railway Company of its liberty and property contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

4. The Supreme Court of Texas erred in invoking the lien statutes of Texas in aid of its refusal to enforce the contract between the parties, and in so construing or giving effect to those statutes as to cause them to impair the obligation of the contract, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

ARGUMENT.

This argument is in itself a summary.

This is not a case of mere erroneous decision by a State supreme court. As stated in the introductory paragraph to the foregoing petition for writ of error, the Supreme Court of Texas, by majority action of two judges (R. 127-134), has arbitrarily refused to enforce a plain and unambiguous contract which is sanctioned by statute and is not in violation of any law or repugnant to public policy; it has arbitrarily changed the terms of the contract made by the parties and substituted in lieu thereof new contractual provisions under which one party is required to perform its obligations and the other party is excused thereform; and it has arbitrarily ignored the plain language of a statute of Texas, authorizing or permitting the contract in question, while invoking other statutes to support its decision.

All such action manifestly is in "clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'," *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

To the decision of the majority, the remaining Supreme Court Justice dissented vigorously (R. 134-141). The case received widespread attention and was the subject of an article in the Texas Law Review, June 1941 issue, pages 509-510, which approved the dissenting opinion. A copy of that article, marked "Exhibit A", is attached hereto and made a part of this argument.

In passing upon constitutional questions, this Court will decide for itself what the contract was, and whether or not it is ambiguous, *Appleby* v. *New York*, 271 U. S. 364, 379-380, 70 L. Ed. 992, 999. Let us examine the instrument which appears in the record (R. 30-34). The contract provided that R. H. Locke should perform all grading and incidental culvert work in connection with the reduction of curves at certain locations on the main line of the Railway Company (R. 31). The contract specified the rates or prices to be paid (R. 31), provided that the Railway's Engineer, promptly after the first of each month, should estimate the work done and determine the amount due Locke, and that the Railway Company thereupon should pay Locke the amount of such estimate, less previous payments and less fifteen per cent (R. 31-32). And paragraph 6 of the contract provided that,—

> "Upon completion of the work herein provided, the Chief Engineer shall have an inspection made and if the work is complete and satisfactory, a final statement of all the work done and moneys due the Contractor shall be made by the Railway Engineer, whereupon, *after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in*

> *full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work to be done hereunder, the Railway shall pay to the Contractor the full amount earned under this contract, less payments previously made,* as soon as final statement can be audited and passed for voucher in the course of the Railway's business" (our italics) (R. 32).

The Bank became the assignee of Locke (R. 35) but it is not contended by the majority opinion that the Bank acquired any greater rights than Locke had.

After completion of the work, the Railway owed Locke a balance of $2,259.11 (R. 44), subject to the provisions of paragraph 6 of the contract. The Bank demanded this entire amount (R. 42-43) which the Railway Company refused to pay because it had notice of outstanding claims against Locke for material and supplies (R. 39-40, 41, 61-62) and because the Railway Company had not been furnished with written evidence satisfactory to it that Locke had paid in full all amounts due by him to any and all persons who performed labor or furnished materials or supplies in connection with the work done by him under the contract (R. 62). It is admitted in the majority opinion that such bills were never paid (R. 129).

In our view it is too plain for argument that there is nothing ambiguous about the contract and in this we are supported by the Court of Civil Appeals for the Eleventh District of Texas, which declared that "the contract is unambiguous" (R. 69), and by the dissenting opinion of Supreme Court Justice Sharp who said:

> "If there is ambiguity whatever in the language employed by the parties, I have been unable to detect it; and the majority opinion does not point out wherein it lies" (R. 137).

If this Court finds, as we think it will, that there was no ambiguity in this contract, then it was and is the simple duty of the State court to enforce it as written, and its refusal to do so was arbitrary action which deprived the Railway Company of its liberty and property without due process of law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States. The dissenting Justice thought the action arbitrary and beyond the power of the State Supreme Court, for he said:

> "Could language be plainer, simpler, and more easy of understanding than the language of paragraph 6 above quoted? The majority opinion, to my mind assumes the issues which we must decide" (R. 137).
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> "* * * conceding for the purpose of this opinion, that the contract was made for the benefit of the railway company alone, I ask what benefit? The majority opinion assumes the answer to that question in this language: '* * * it is evident that the provision was embraced in the contract only to protect the railway against liens which might attach to the fund retained by virtue of our applicable lien statutes.' What right have we to make that assumption? The majority opinion does not point out the 'applicable lien statutes.' Presumably the reference was intended to be Article 5452 et seq., R. C. S. 1925. To my mind one insuperable barrier to the conclusion of the majority is the very material difference between the language of Article 5452 and that employed in paragraph 6 above. The parties to this contract provided for retaining a part of the amount to be paid until evidence was furnished that payment had been made 'to any and all persons who may have performed labor or furnished materials or supplies to the contractor in connection with the work.' The statute clearly gives no lien for supplies, and to assume that the parties intended to protect from

a lien when no lien was possible would hardly be warranted.

"But, be that as it may, and disregarding this apparent barrier, while still assuming that the provision was made for the benefit of the railway company alone, we return to the question, what benefit? Has a court the right to tell parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others?" (R. 137-138).

* * * * * * *

"* * * after all, we get back to the simple, fundamental principle with which we started. It is not for the courts to make contracts between parties, and tell them what they meant by the use of clear unambiguous language. Regardless of why the parties put this provision in the contract, the fact remains that it is there and that it violates no law or public policy; and it is my view that our limited duty is to enforce it as it is written" (R. 139).

* * * * * * *

"It is unquestioned that the parties had the right to make the foregoing contract. This being so, they had the right to require its fulfillment. It is not the policy of the law to bestow a right without furnishing a remedy for its enforcement" (R. 140).

As stated in the dissent (R. 137), the majority opinion does not point out any ambiguity in the contract, and admits (R. 131) that "courts do not resort to arbitrary rules of construction where the intention of the parties is clearly expressed in unambiguous language", citing *Magnolia Petroleum Co.* v. *Connellee,* 11 S. W. (2d) 158, a case in which the Supreme Court of Texas adopted an opinion written by the Commission of Appeals of Texas, Section B, wherein it was said:

"There are some rules applicable for the construction of written contracts, for the purpose of ascertain-

ing from the language used the manner and extent to which the parties intended to be bound. Courts, however, are not permitted to resort to arbitrary rules of construction where the intention of the parties is expressed in clear and unambiguous language * * * but will enforce the contract according to its terms * * *" (11 S. W. (2d) 159).

The majority opinion has not specified any ambiguity in this contract, hence the failure of the court below to apply these clearly expressed principles of law in this case is further evidence of its arbitrary action.

Not having any ambiguity to point out, the majority opinion falls back upon the pure assumption that paragraph 6 was placed in the contract "only to protect the Railway against those who might claim liens against it under our (Texas) lien statutes pertaining to railroads" (R. 132). As shown in the dissenting opinion, the Court has no right to make this assumption (R. 137), "to tell the parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others" (R. 138), to "tell them what they meant by the use of clear unambiguous language" (R. 139), and "to make contracts between the parties" (R. 139). But the majority opinion has done these things and it has changed a contract requiring that "*all* persons" shall be paid, into one which requires only that persons filing liens shall be paid. Under that opinion the contract is just as surely changed and restricted in its operation and effect as if the Court had written bodily into the contract the italicized language appearing at the end of the following quotation from paragraph 6:

> "* * * after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished

materials or supplies to the Contractor'' *and who have filed liens against the Railway.*

There is no justification in the lien statutes of Texas for this arbitrary action, and the majority opinion points to none. Those statutes, *Articles 5452* to *Article 5472c*, Vernon's Revised Civil Statutes of Texas, Chapter 2 of Title 90, affecting mechanics, contractors and materialmen, sets forth the conditions under which liens may be fixed, but it is expressly stated in *Article 5468* that ''nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price.'' Accordingly, the parties contracted that Locke would be paid *after* he had furnished the Railway Company with written evidence satisfactory to it that he had paid ''*all* persons'' performing labor or furnishing materials or supplies (R. 32). The assumption of the majority opinion that the parties intended ''only to protect the Railway against those who might claim liens against it under our (Texas) lien statutes pertaining to railroads'' (R. 132) not only is unwarranted but is pure arbitrary action.

The arbitrary attitude of the court below also is evidenced by its use of *obiter dicta* found in *Getty et al.* v. *Penn. Inst. etc.*, 194 Pa. 571, 45 Atl. 333, to bolster its refusal to enforce the contract as made. This was pointed out in a second motion for rehearing which was presented by the Railway Company to the court below and by it returned unfiled.

And the apparent determination of the court not to enforce the contract which the parties made is further evidenced by its refusal to remand the case, as suggested by the Railway Company (R. 148), so that it might prove the facts showing the real intention of the parties at the time the contract was made, namely, that all persons performing

labor or furnishing materials or supplies should be paid whether liens were filed or not.

Frankly, we do not understand the court's attitude for, as stated in the dissenting opinion, it seems to us "altogether commendable * * * to make provision that persons who furnish labor and material * * * should be paid" (R. 138), and if a "company desires to do that, why should courts prevent it?" (R. 139). Such action certainly is contrary to the general rule that "competent persons shall have the utmost liberty of contracting" and "their agreements voluntarily and fairly made shall be held valid and enforced in the courts", *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 356, 75 L. Ed. 1112, 1116.

Wherefore, it is respectfully submitted that the petition for writ of certiorari should be granted and that upon final hearing the judgment of the Supreme Court of Texas should be reversed.

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Frank Parrott, M. M. Dawson and K. A. Browning doing business as a co-partnership under the trade name of F. C. Crane Company, and Fort Worth Sand & Gravel Company, a Texas corporation, hereby adopt the foregoing brief in support of the petition for writ of certiorari.

GUTHRIE & GUTHRIE,
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EXHIBIT "A".

Texas Law Review.

June, 1941.

Pages 509-510.

Contracts—Third Party Beneficiaries—Conditions Precedent.—Locke contracted to do grading and culvert work for the defendant railway. The contract provided that out of the balance owed to the contractor each month the defendant would retain fifteen per cent, which should constitute a final payment, to be made after the contractor had furnished proof that he had paid in full all materialmen. The construction job having been completed, the bank, assignee of Locke, sued the railway for the fund retained; and unpaid materialmen intervened, claiming a right to be paid out of the fund on the ground that they were third party beneficiaries of the contract between the railway and Locke. *Held,* that the contract was not a third-party-beneficiary contract but was made solely for the benefit of the railway; and that the bank could recover against the railway without performance of the condition, which would be of no benefit to the railway since the time for fixing materialmen's liens had passed. Citizens National Bank of Abilene *v.* Texas & Pacific Ry., 9 Tex. Sup. Ct. Reporter, 246 (March 22, 1941).

In Texas, as in most jurisdictions, the right of recovery by a third-party-beneficiary is well settled. Allen *v.* Traylor, 212 S. W. 945 (Tex. Comm. App. 1919); Employers Casualty Co. *v.* Ponton, 41 S. W. (2d) 147 (Tex. Civ. App. 1931); Aetna Ins Co. *v.* Texarkana National Bank, 60 S. W. (2d) 251 (Tex. Civ. App. 1933, writ of error dism'd). In a suit involving the claim of a third-party-beneficiary it is ordinarily clear that a promise has been made, and the controversy arises over whether the promise was intended for the benefit of the third-party-beneficiary. Banker *v.* Breaux, 133 Tex. 183, 128 S. W. (2d) 23 (1939), (1939) 18 Texas Law Review 84. Both the majority and dissenting opinions of the principal case recognized the difficulty in

finding any promise to pay materialmen, proof of such payment being stated as a condition. Moreover the usual suit is against the promisor, whereas in the principal case, even if a promise to perform the condition be implied, the railway, against whom the interveners ask judgment, would be the promisee. See (1939) 18 Texas Law Review 85. Thus it would seem that the majority was correct in refusing recovery against the railway on the theory of a third-party-beneficiary contract, and the railway might waive the condition and pay the bank without incurring any liability to the materialmen.

A more difficult problem is presented by the court's decision that the bank could recover against the railway without performing the condition precedent. As a general rule conditions precedent must be exactly fulfilled or no liability can arise on the promise which such conditions qualify. 3 Williston, Contracts (rev. ed. 1936), § 675. The fact that non-performance of the conditions has caused no injury to the promisor is immaterial. Jungmann & Co. *v.* Atterbury Bros., 249 N. Y. 119, 163 N. E. 123 (1928). Though a condition precedent has confessedly not been performed recovery is allowed on the contract itself when the consequences of enforcement of the condition would result in severe forfeiture. 3 Williston, Contracts, § 793. This proposition was applied in Fountain *v.* Stein, 97 Conn. 619, 118 Atl. 47 (1922), as there performance of the condition precedent had become impossible. The principal case is not analogous, for, by paying the interveners, the bank can become entitled to judgment against the railway and thereby avoid forfeiture. In the principal case the court concludes that the railway must pay the bank, assignee of the contractor, without performance of the condition, since performance thereof would be of no benefit to the railway. The court relies on a clear statement to that effect in Getty *v.* Pennsylvania Institution for Instruction of the Blind, 194 Pa. 571, 45 Atl. 333 (1900). But such statement is *dictum*, for neither the contractor nor his assignee was a party to the suit, the materialmen alone having sued. A search of the authorities has revealed no other case holding that a condition precedent is waived merely because performance of

the condition will not benefit the party insisting upon it. Moreover, in the principal case it is arguable that performance of the condition will benefit the railway in the maintenance of its good will. It should be immaterial whether the railway insists on performance of the condition for the same reason that it insisted upon inclusion of the condition in the contract. It would seem that the railway acted within its rights in demanding performance of the condition, and the railway should be allowed to insist upon judgment that the bank take nothing until it furnished proof of payment to the materialmen.

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